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No. 97-9217

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of over 10,000 attorneys, and another 28,000 affiliate members in 80 affiliate organizations in 50 states. NACDL is recognized by the American Bar Association ("ABA") as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*.[2]

The primary interest of *amicus* NACDL is the maintenance of existing procedures that help to ensure that convicted criminal defendants who waive their direct appeals as of right do so knowingly.

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[1] All parties have consented to the appearance of NACDL in this matter, and letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A Westlaw search of the SCT database yielded 75 references to the National Association of Criminal Defense Lawyers in the capacity of *amicus curiae*. The references extended over a period of nearly 25 years; the most recent was *United States v. Balsys*, 118 S. Ct. 2218, 2223 n.3 (June 25, 1998).

STATEMENT OF THE CASE

On April 22, 1992, the United States District Court for the Middle District of Pennsylvania sentenced defendant Manuel DeJesus Peguero to imprisonment for 274 months (22 years and 10 months). (Joint App. 56-57.) The district court was required, when imposing sentence, to advise the defendant of his right to appeal this sentence. Fed. R. Crim. P. 32(a)(2).[3] The district court did not inform defendant Peguero of that right. (See Joint App. 22-57, *passim*.)

The ten-day period for filing a notice of appeal came and went. See Fed. R. App. P. 4(b). Defendant did not file a notice of appeal in that period, and did not request that the clerk of the court file one on his behalf. (See Joint App. 7-8, *passim*; 174.) There was no "excusable neglect" motion or order that might potentially have extended the appeal deadline up to thirty additional days. Fed. R. App. P. 4(b). Accordingly, there was no direct appeal in the case.

In August 1993, Peguero's mother wrote to the court, requesting that her son's sentence be reduced based on the erroneous advice of his counsel. In January 1995, Peguero filed a motion for free transcripts of his guilty plea and sentencing, stating that he wished to raise a challenge based upon the ineffective assistance of counsel and other sentencing-related grounds. On March 16, 1995, defendant followed up with a motion for "clarification" of the grounds for his sentence. All of these motions and requests were denied or dismissed. (Joint App. 8-9, 174-75)

On December 10, 1996, Peguero filed a *pro se* motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255. The motion asserted various grounds including ineffective assistance of counsel. (Joint App. 9, 58-67.) On April 23, 1997, the Federal Public Defender was appointed to represent Peguero in the § 2255 proceedings. (Joint App. 11.) The Public Defender, having evidently obtained the transcripts (Joint App. 11, docket item 68), supplemented the motion to include the district court's failure to advise Peguero of his appellate rights. (Joint App. 12, 92-93.)

The district court held an evidentiary hearing to determine, *inter alia*, whether Peguero's counsel had advised him of his right to appeal and whether he had voluntarily waived the direct appeal from his sentence. (Joint App. 95.) The court took testimony from Rex Bickley, Esq., Peguero's former counsel, who had already supplied a written statement

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[3] Rule 32(a)(2) was the effective provision as of April 22, 1992, the date of Mr. Peguero's sentencing. That version read:

> **"(2) Notification of Right to Appeal**
>
> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

Effective December 1, 1994, the substance of this rule was transferred to Rule 32(c)(5), Fed. R. Crim. P., and reworded to some extent. The Advisory Committee Notes to the 1994 amendments state that, "[a]lthough the provision has been rewritten, the Committee intends no substantive change in practice." The parties do not seem to have disputed that the earlier version of the rule is applicable, but our arguments in this brief would apply to the current Rule 32(c)(5) as well.

to the Assistant U.S. Attorney, and from Peguero. (Joint App. 94-165.)

The district court denied the Section 2255 motion in a written opinion. The court found factually that, although it had not informed Peguero of his right to appeal, Peguero's attorney did so inform him. Peguero, the court found, chose to concentrate upon cooperating with the prosecutors in the hope of obtaining a reduced sentence pursuant to Fed. R. Crim. P. 35(b), instead of filing an appeal. (Joint App. 180-81, 184.) In so finding, the court resolved credibility questions against Peguero, because the cooperation strategy was plausible in light of the record; because defendant had delayed before bringing his Section 2255 claim before the court; and because the court's prior experience with the attorney, Mr. Bickley, led it to believe that Bickley had testified truthfully. (Joint App. 180-81.) As to the law, the court reasoned that a bare Rule 32 violation was not cognizable under Section 2255 unless it had resulted in a proceeding "inconsistent with the rudimentary demands of fair procedure."[4] That, in the district court's view, required more than a violation of the Rule; a defendant must "make [a] showing" that he was "actually unaware" of his right to appeal. (Joint App. 184, citing *United States v. Timmreck*, 441 U.S. 780, 784 (1979).) Because Peguero "knew about his right to appeal," the district court held, he could not collaterally attack the court's failure to inform him of his right to appeal as required by Rule 32(a)(2). (Joint App. 184.)

[4] The district court applied the same reasoning to a Rule 11 violation. The defendant had also challenged his guilty plea based on the District Court's failure to give seven of the warnings required by Rule 11, Fed. R. Crim. P.

The United States Court of Appeals for the Third Circuit affirmed in an unpublished panel Memorandum Opinion. (Joint App. 192.) In doing so, it cited the minority view of the Eighth Circuit that "a sentencing court's failure to inform a defendant of the right to appeal following a jury conviction is 'harmless error' if the government can show by clear and convincing evidence that the defendant knew of the right to appeal." (Joint App. 194-95, quoting *McCumber v. United States*, 30 F.3d 78, 79 (8th Cir. 1994).) The Third Circuit reviewed the record and concluded that "it is clear that Peguero knew of his right to appeal." (Joint App. 195.) Consequently, in the Third Circuit's view, the district court's denial of Section 2255 relief was not erroneous.

A petition to this Court for a writ of *certiorari* followed. That petition was granted on September 29, 1998.

SUMMARY OF ARGUMENT

Rule 32(a)(2), requires every district court, in every case, to advise convicted defendants of their right to appeal. It is a mandatory procedure, time-tested and experience-driven; it is also a prophylactic rule designed to protect the right to appeal. Where the district court fails to give the required advice, seven of the nine Circuits that have addressed the question have required resentencing, rather than making a case-by-case determination as to whether defendant learned of the right to appeal from some other source.

The right to appeal, while not Constitutionally based, is highly important and is fraught with Constitutional guarantees. The rationale of Rule 32(a)(2) is to ensure that any waiver of a right to appeal -- which is ordinarily

accomplished by silence or inaction -- is an informed one. Advice by the court is the minimum prerequisite for an informed waiver, and advice from other sources is not an adequate substitute.

There should not be a hearing to determine whether a violation of this bright-line rule was harmless, because the very purpose and rationale of this simple rule is to obviate such a hearing. Such hearings will often involve credibility contests between defendants and lawyers. Where the procedural right to appeal is at stake, it is unacceptable allocate the risk of inaccurate factfinding to defendants. But for the error of the district court, defendant's right to appeal would be on the record and indisputable.

Similarly, the high threshold for Section 2255 relief should not apply, because that doctrine presupposes that the defendant has already either exercised his right to appeal or waived it in accordance with the proper procedures.

Petitioner Peguero does not seek the reversal of a conviction or sentence. He asks only that the district court place him in the procedural position that he would and should have occupied absent the court's error.

ARGUMENT

A VIOLATION OF RULE 32(A)(2) SHOULD BE TREATED AS *PER SE* ERROR, REQUIRING RESENTENCING TO REINSTATE A DEFENDANT'S RIGHT TO APPEAL

A. The Error And The Issue

As to the underlying error there is no dispute. When the district court imposed sentence in this case, it omitted a basic procedural safeguard. Rule 32(a)(2) of the Federal Rules of Criminal Procedure imposes a simple duty directly upon each district judge: the judge must advise a sentenced defendant of the right to test the legality of his or her sentence on appeal.

In this case, that command was disregarded. The only question before this Court is whether that error is to be excused, or whether the district court must be required to comply with this simple procedural directive. Seven circuits hold that this Rule is a procedural requirement, the violation of which constitutes error *per se*. Under this *per se* view, the defendant must be resentenced (with the required advice of rights) in order to restart the running of the 10-day period to file a notice of appeal. Only two circuits hold to the contrary. In their view, the defendant is not entitled to any remedy unless he or she was subjectively unaware of the right to appeal.[5]

In the unpublished decision below, a panel of the Third Circuit, without discussing its own contrary published precedent, adopted the minority view of the Eighth Circuit. It upheld the denial of Section 2255 relief based upon the district court's finding that Peguero had been aware that he could appeal, even though the judge had failed to so inform him. This circumstance, in the Third Circuit's view,

[5] The Circuits were most recently canvassed by the Eleventh Circuit in *United States v. Thompson*, 111 F.3d 109, 110 (11th Cir. 1997). *Thompson* ascribes the majority view to "[s]ix circuits" other than the Eleventh.

rendered the omission "harmless error" and/or prevented it from rising to the level of a "miscarriage of justice." (Joint App. 196-97.)

Accepting the factual finding that Peguero was in fact aware that he could appeal, this case squarely presents the issue of whether the "*per se* error" or the "harmless error" approach to Rule 32(a)(2) is correct. *Amicus curiae* NACDL writes to stress that the *per se* error rule ensures the integrity of criminal processes, by making certain that waivers of the right to appeal are informed. It is a simple, universally applicable prophylactic safeguard that should be applied across the board, as intended.[6]

B. Rule 32(a)(2) Is A Waiver-Based Procedural Guarantee

Rule 32(a)(2) is a structural, procedural mandate intended (a) to ensure that convicted criminal defendants have ready, unfettered access to the appeals process; or, alternatively, (b) to ensure that convicted defendants who waive the right to an appeal do so knowingly. Both goals are important. It is salutary that criminal convictions be regularly tested by the appeals process, not only because error will sometimes be found, but because that testing process itself confers legitimacy on the vast majority of convictions. Alternatively, where a defendant, by inaction,

[6] The case law contains an exception for the defendant who timely files an appeal, but includes a claim that the district court failed to advise him of his right to appeal. Arguably the court may properly find the Rule 32(a)(2) violation harmless in this very limited context, because such a defendant has not missed his right to appeal, the very circumstance that renders the concept of harmlessness speculative or inapplicable. See *United States v. Chang*, 142 F.3d 1251 (11th Cir. 1998).

decides to forgo an appeal, that must be an informed decision.

Nothing requires a defendant to take an appeal -- just as nothing requires a defendant to plead not guilty, to employ counsel, to insist on a jury, or to testify on his or her own behalf. The right to an appeal, like other fundamental rights, may be waived.

A waiver is ordinarily defined as an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The particular nature of the waiver procedure, however, varies according to the importance of the right and the context, even as to fundamental decisions. If the right being waived is routine -- as in the case of failure to make an ordinary evidentiary objection, or the client's absence from a routine trial conference -- no special protections have been required. Mere silence is enough, especially where defendant is counseled. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 527-28 (1985). In some cases the courts have relied solely upon counsel to inform a defendant of his or her legal rights, in this way ensuring that any waiver-by-silence is knowledgeable. See *United States v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995) (surveying Court of Appeals case law governing defendant's decision whether to testify). For certain important Constitutional rights only an explicit affirmative waiver, after prescribed warnings, will be sufficient. *E.g.*, *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to trial counsel); *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea); *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required for suspect in custody to waive right to counsel and to remain silent); *Von Moltke v.*

Gillies, 332 U.S. 708, 724 (1948) (plurality opinion) (judge's responsibility to ensure knowing waiver of counsel).

The right to an appeal is waived by silence, but Rule 32(a)(2) dictates that it must be a warned silence. A defendant who fails to file a notice of appeal within 10 days of entry of judgment irretrievably loses his or her right to appeal. Fed. R. App. P. 4(b) (with irrelevant exceptions). That mere inaction, however, is not sufficient to waive the right to appeal *unless* it is preceded by the court's personal advice that the defendant has the right to appeal. The Rule imposes that minimum level of procedural protection because (a) the right to an appeal is not so routine or unimportant that the vagaries of waiver-by-silence are an acceptable trade-off for efficiency; and (b) that right cannot be entrusted solely to counsel, given the fragile state of the attorney-client relationship at the completion of the trial-court proceedings.[7]

C. Rule 32(a)(2) Embodies A Recognition That The Right To A Direct Appeal Is Too Fundamental To Be Waived By Mere Unwarned Inaction

That right to test one's conviction for legal error on direct appeal is a highly valuable right. Over thirty-five years ago, this Court observed that the right to appeal from a federal criminal conviction had become, "in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 440 (1962); *see also, e.g.*, 28 U.S.C. § 1291 (appeal from final

[7] Clearly, the Rule imposes at least this minimal level of protection. We do not propose to discuss the issue of whether the right to appeal is so fundamental that more elaborate warnings or a more explicit waiver should be required, an issue which was not raised below or in the *certiorari* petition.

order of district court); 18 U.S.C. § 3742 (appeal from erroneous criminal sentence). Over forty years ago, this Court observed that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Even the Eighth Circuit decision relied upon by the court below in this case acknowledged that the right to appeal a criminal conviction, while not guaranteed by the Constitution, "is unquestionably a substantial right." *United States v. Drummond*, 903 F.2d 1171, 1174 & n.8 (8th Cir. 1990) (citing *Coppedge, supra*), *cert. denied*, 498 U.S. 1049 (1991).

A direct appeal is the primary backstop against trial-court error. Indeed, this Court has relied upon the primacy of direct appeal in order to justify restricting Section 2255 and habeas relief to cases of fundamental error:

> Direct review is the principal avenue for challenging a conviction. 'When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. ...'

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Indeed, this Court has held that the decision whether to take a criminal appeal is one of a handful of decisions deemed so "fundamental" that only the client, not the lawyer, may make it. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he

accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

To be sure, this Court has not recognized the right to a criminal appeal as being inherent in the concept of due process of law.[8] The Court has, however, consistently recognized the critical importance of at least one level of appellate review to ensure that convictions are legally and factually correct. Where an appeal as of right is provided for, it is tantamount to an implicit determination "that [the government] was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with the law." Such a system really makes "the appeal the final step in the adjudication of guilt or innocence of the individual ...." *Evitts v. Lucey*, 469 U.S. 387, 403-04 (1985).

The right to appeal, if not Constitutional in origin, is protective of Constitutional rights, and is hedged about by Constitutional protections. Where the right to an appeal exists, it must be administered in keeping with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. at 400-01. Where a state does provide for a first appeal as of right, the

[8] Over a hundred years ago, this Court stated that the right to take a criminal appeal is not inherent in the notion of due process in *McKane v. Durston*, 153 U.S. 684, 687 (1894), a holding that continues to be cited. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The cases before this Court have considered what restrictions or burdens may constitutionally be attached to a statutory right to appeal. E.g., *Ross v. Moffitt*, 417 U.S. 600, 605-08 (1974) (surveying line of cases dealing with right to counsel, filing fees, access to transcripts, etc., on criminal appeal).

Fourteenth Amendment guarantees a criminal defendant the right to counsel. *Douglas v. California*, 372 U.S. 353 (1963); see also *Evitts v. Lucey*, 469 U.S. at 393. Moreover, criminal defendants have a due process right not just to counsel, but to the effective assistance of counsel, on direct appeal. *Evitts v. Lucey, supra*. Because of the procedural and liberty interests at stake, this Court has not hesitated to strike down as unconstitutional even fairly minor burdens upon the statutory right to appeal.[9]

The right to a direct appeal, then, is so crucial to the preservation of other rights, that it occupies an exalted and perhaps unique status in the criminal justice system. Moreover, a defendant cannot waive the right of appeal itself without waiving the Constitutional protections that surround it. Because the loss of this right by definition cannot be remedied on direct appeal, unfettered access to another remedy is required, as discussed further below. The place of an appeal in our criminal justice system is one important guide to understanding the nature, purpose and scope of Rule 32(a)(2) as it relates to a potential waiver of appellate rights.

D. Rule 32(a)(2) Embodies A Recognition That The Advice Of The Right To Appeal Must Come

[9] See *Evitts v. Lucey*, 469 U.S. at 393 (collecting cases); *Ross v. Moffitt*, 417 U.S. at 605-08 (synthesizing earlier case law, and finding no right to counsel for discretionary, second or subsequent level of appeal); *Draper v. Washington*, 372 U.S. 487 (1963) (availability of free transcript to indigent defendant seeking an appeal cannot be conditioned on trial court's finding of nonfrivolousness); *Burns v. Ohio*, 360 U.S. 252 (1959) (striking down $20 filing fee for indigents to move for leave to appeal from intermediate appellate court's affirmance of criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down requirement that appellant obtain transcript, where no provision made for indigent defendants).

From The Court, As Reliance Upon Counsel's Advice Cannot Ensure That Defendant's Silence Actually Constitutes An Informed Waiver Of The Right To Appeal

A district court might comfort itself with the knowledge that competent counsel will ensure that defendant's private, off-the-record waiver is an informed one. "Upon this point a page of history is worth a volume of logic."[10] The failure of this approach is the very reason for the enactment of Rule 32(a)(2). It is not that defense counsel cannot be trusted; far from it. Rather, experience has shown that the very brief period for appeal can easily slip by unnoticed in the ten days following the entry of judgment, a period in which the attorney-client relationship is often in flux. In addition, the amendment to the Rule makes it clear that the attorney cannot act as a surrogate for the court in this context.

Rule 32(a)(2) replaced old Rule 37(a)(2), which required the court to advise only unrepresented defendants of their right to appeal.[11] See Fed. R. Crim. P. 32, Advisory Committee Notes, 1966 amendment. As the Advisory Committee explained it, the scope of the Rule was expanded to include represented defendants for a number of reasons. The underlying concern was that, at this stage of the proceedings, the attorney-client relationship may be breaking

[10] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

[11] Former Rule 37(a)(2) stated:

> "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal, and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

down, and silence therefore may not be a reliable indicator of defendants' intent to waive an appeal:

> [S]ituations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., *Hodges v. United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis.

Advisory Committee Notes, *supra*.[12]

As the Advisory Committee implies, the period immediately following sentencing is often a fragile point in the attorney-client relationship. Some attorneys may be unwilling, or feel themselves unqualified, to handle an appeal. Court-appointed counsel are too often confused or unaware that their duties include the filing of a timely notice of appeal absent an intelligent waiver by the client. In the

[12] Under current law, defendants are more likely to be remanded directly after sentencing than in 1966, when the Advisory Committee wrote. *Compare* 18 U.S.C. § 3143 (b) (current ver.) with 18 U.S.C. § 3148 (1982).

case of retained counsel, the retainer may have been exhausted long ago, and counsel may be reluctant to file a notice of appeal that may carry with it the obligation to see the appeal through. Some convicted and sentenced clients may be -- perhaps unjustifiably, but nevertheless understandably -- dissatisfied with their attorneys' services, even to the point of anger or blame. For all these reasons, the client may not feel certain whether the lawyer still is or should be his or her lawyer.

This Court, in *Rodriquez v. United States*, 395 U.S. 327 (1969), noted the twilight zone of representation that follows sentencing. There, the trial judge failed to advise a represented defendant of the right to appeal. Counsel moved to obtain leave for the client to proceed *in forma pauperis*, indicating that "petitioner would be unrepresented in the future." 395 U.S. at 331. Meanwhile the defendant's right to appeal simply fell in the cracks, seemingly a victim of the unsettled status of defense counsel. See *ibid.*

The *Rodriquez* Court expressed the confident conviction that the intervening 1966 amendment to the rules would settle this issue once and for all: "The problem of determining whether to give notice to a person represented at trial, but who may not be represented on appeal, will therefore not recur." *Id.* at 331 n.3; see also *Dillane v. United States*, 350 F.2d 732, 733 (D.C. Cir. 1965) (this problem is "in the process of becoming academic"); *cf. Boruff v. United States*, 310 F.2d 918, 921 (5th Cir. 1962) (advice of court required because ten-day period to appeal "would be an unrealistically short time, for a person who was not guided during every moment of the ten days by the advice of counsel").

For all these reasons, the 1966 revision constituted a recognition that, while an unwarned waiver might ideally work as the old rule intended, often it did not. What was needed was a bright-line rule, applicable to everyone.

The optimistic view of Rule 32(a)(2) is valid only to the extent that the Rule is enforced rigorously and literally. Under the post-1966 rule, every defendant must be told by the court of the right to appeal. We do not suggest that this is a panacea or an ironclad guarantee of a knowing waiver. But ten days of inaction, following such advice, is no longer so insolubly ambiguous, when the court's advice provides at least a minimum prerequisite for interpreting the silence as a waiver.

This advice, as the Rule implicitly recognizes, must come from the district court itself, not from counsel. Coming from a neutral judge, it carries the weight of authority and impartiality. Coming from the decisionmaker whose rulings would be challenged, it removes any question of intimidation or fear of reprisal from the mind of an unsophisticated defendant. Coming from the court, it constitutes a guarantee of fairness, not tactical advice.

This advice from the court also sweeps aside any representation issues between client and lawyer, and disposes of any practical difficulties in filing a notice of appeal. It sweeps aside representation issues because the court delivers the advice directly to the defendant. It disposes of practical difficulties because the defendant need only say the word, and the clerk will "prepare and file forthwith" a notice of appeal on defendant's behalf.[13] Fed. R. Crim. P. 32(a)(2).

[13] By taking advantage of this opportunity, the defendant can ensure that the appeal is filed on time, without preliminary haggling over continued

Perhaps most crucially, the court's advice that an indigent defendant may proceed *in forma pauperis* removes any perceived financial disincentive to filing a notice of appeal. Defendants learn directly from the court that their attorney's reluctance or desire to secure a fee does not stand between them and their appellate rights.

Finally, a mandatory and inflexible Rule helps ensure that trial and sentencing errors will be uncovered and corrected. The Rule makes the advice of the right to appeal public and nondiscretionary. The natural human temptation to bury one's mistakes is taken out of the equation.

Rodriquez v. United States, supra, supports the position that the procedural opportunity afforded by the Rule is valuable in and of itself, suggesting a narrow scope for harmless error analysis. In that case, the government conceded that the district court erred in dismissing defendant's Section 2255 motion on the ground that he had failed to allege "prejudice," in the sense of a meritorious issue that he would have pressed on appeal. This Court agreed. 395 U.S. at 330. The government sought a remand so that the district court could take evidence as to why counsel did not file an appeal. This Court, relying for the most part upon the district court's violation of old Rule 37(a)(2), rejected the need for further fact finding. In the Court's view, the district court's error had deprived defendant of his right to appeal, and "[s]ince this deprivation appears on the record before us, we see no need for any

representation, an additional retainer, and so on. All of these attorney-client issues only underscore the wisdom of not permitting the court to delegate to counsel the Rule 32(a)(2) duty, as has been the practice in some courtrooms.

factual determinations on remand." *Id.* at 331. *Rodriquez* suggests that harmless error must be narrowly defined where the error applies to procedures that guarantee access to the judicial process.

In short, the court's violation of this Rule does not just deprive the defendant of a tidbit of procedural knowledge, which may be supplied by another. It burdens the right of appeal, and makes it less likely that defendants will appeal. Taken together, all of these aspects of the amended Rule add up to a recognition that, at this stage of the proceedings, the attorney's advice is inherently not an adequate substitute for the court's advice.

Fairly minimal burdens on the right to appeal, such as a $20 filing fee or a preliminary determination of merit, have led this Court to strike down state statutes as unconstitutional.[14] Surely the burden on the right of appeal resulting from a Rule 32(a)(2) violation will support a decision simply to enforce the Rule as written.

F. The "Harmless Error" Approach Undermines The Very Purpose Of The Rule, Which Is To Impose A Nondiscretionary Duty On The Court And Eliminate Case-By-Case Evaluation

Rule 32(a)(2) was adopted as a "bright line" rule, because old Rule 37(a)(2) led to "persistent litigation over whether the defendant had been fully informed of his rights by his counsel." *United States v. Drummond*, 903 F.2d 1171, 1175 (8th Cir. 1990) (Heaney, J., dissenting). The overwhelming majority of Circuits, which have adopted the

[14] See p. 13 & n.9, *supra*.

per se error approach, have held that the mandatory character of Rule 32(a)(2) effectively overrides the harmless error doctrine of Rule 52(a):

> The requirement of explicit notice of the right to appeal one's sentence is 'designed to insure that a convicted defendant be advised precisely of his right to appeal and to avoid a situation where the Government claims a defendant is otherwise aware of his right to appeal while the defendant denies such knowledge.' [quoting *Paige v. United States*, 443 F.2d 781, 782 (4th Cir. 1971)].... We hold that even in cases, such as this one, where the record is clear that Appellant became aware of his right to appeal through other sources, the sentencing court's failure to give notice of this right constitutes error per se. Like the majority of our sister circuits, we are persuaded that 'the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2).' [quoting *Reid v. United States*, 69 F.3d 688, 690 (2d Cir. 1995)]....

Thompson v. United States, 111 F.3d 109, 111 (11th Cir. 1997). Rule 32(a)(2) embodies a policy choice that the risk of adverse fact-finding will not be allocated to the defendant in so basic a matter as access to an appeal.

Put another way, a hearing cannot remedy the violation of a rule, where the purpose of the rule is to eliminate a hearing. The Circuits in the majority have rejected the remedy of holding a hearing "just-this-once" in

order to patch over a Rule 32(a)(2) violation, in favor of a bright-line compliance approach.

Underlying such holdings is the notion that Rule 32(a)(2) is a simple, workable rule of general applicability. Its predictability and certainty would, however, be greatly undermined by permitting case-by-case litigation.

As one court put it, hearings (like the one below in this case) "will often turn solely upon judgments as to the veracity of conflicting witnesses and the reliability of their memories ... such a proceeding is a poor substitute for initial compliance with the rule." *United States v. Benthien*, 434 F.2d 1031, 1032 (1st Cir. 1970). It is unavoidable that questions of historical fact in a criminal case will turn on such testimonial evidence. It is unacceptable, however, that so basic and fundamental a procedural guarantee as the right to appeal should hinge on credibility-based fact finding. In such a hearing, it hardly requires stating, a defendant has an obvious motive to state that the attorney failed to deliver the proper advice, and the attorney's professional pride and instinct for self-preservation may tend to push his or her testimony in the opposite direction.

That is no substitute for compliance with this simple Rule. But for the court's error, the defendant's right to appeal would appear on the face of the transcript. Where a court violates Rule 32(a)(2) the defendant's right to appeal is reduced from a matter of simple right to a question of credibility.[15]

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[15] The factfinder of course will be the very court whose error created the need for a hearing. This case illustrates the unavoidable pitfalls that defendants face in such a hearing. For example, one of the district court's three reasons for accepting the testimony of Peguero's attorney,

In addition, such a hearing is bound in many cases to invade attorney-client communications and drive a wedge between lawyer and client. This might be an acceptable cost in the context of, *e.g.*, an ineffective-assistance claim, where the defense is arguing that its own mistakes rendered a conviction unfair. Under the "harmless error" approach here, however, the defendant is placed in this quandary as a result of the *court's* error. The Circuits in the majority sensibly require that the court simply repair its error, instead of putting the burden on the defendant.

At any rate, the policy of Rule 32(a)(2) is that there is a better way, and it makes that better way mandatory.

G. The "Harmless Error" Approach, Which Balances The Costs Of Retrial Against The Seriousness Of The Error, Is Inappropriate Because The Issue At Stake Is Reinstatement Of An Unquestioned Procedural Right To File An Appeal

The rationale of the harmless error doctrine is a sound and practical one as far as it goes. Petitioner does not propose a wholly unworkable system in which each defendant is tried and retried until perfection is achieved. The specter of "automatic reversal" that the government

rather than that of Peguero, was its "experience with his trial counsel in previous matters. Counsel is an able lawyer, honest in his dealings with the court in the past ...." (Joint App. 181.) We have no reason to doubt that that is the case. Nevertheless, this is hardly a level playing field for a criminal defendant. And it is by virtue of the court's error -- not the error of defendant or his counsel -- that defendant is placed in this unequal position.

purported to raise in opposition to the petition for certiorari is a straw man. (Brief of United States, p. 8.)[16] The only "reversal" requested here is correction -- upon motion, in district court -- of the district court's erroneous failure to conduct sentencing in accordance with Rule 32(a)(2) The remedy is resentencing in order to reinstate the defendant's right to appeal.[17] At that point a defendant may file an appeal, in which his conviction or sentence may be affirmed or reversed. Such a resentencing is worlds apart from "reversal" in the usual sense (much less "automatic reversal"), and does not entail the same costs.

Where a convicted defendant on appeal asserts an error at trial, the appellate court's harmless error analysis necessarily incorporates a weighing of the seriousness of the error and the costs of reversal. As this Court has stated, the harmless error doctrine is necessary because "the reversal of a conviction entails substantial social costs," including duplication of effort, psychological stress, decreased accuracy because of the unavailability of evidence or the erosion of memory, the increased probability of unwarranted acquittals, and delay in the administration of criminal justice. *United States v. Mechanik*, 475 U.S. at 72. Where the error does not affect the fairness of the result, those costs are not justified. *Ibid.*

[16] The phrase seemingly derives from *United States v. Mechanik*, 475 U.S. 66, 71 (1986), in which the appellant sought dismissal of the indictment and reversal of his subsequent conviction.

[17] This remedy, taken from *Rodriquez* and the majority of Court of Appeals cases, eliminates the issue of appellate jurisdiction. It results in the entry of a new judgment, which restarts the clock and permits the Court of Appeals to take jurisdiction under Fed. R. App. P.4(b)

Such an analysis is far less relevant to a Rule 32(a)(2) error, however. Rule 32(a)(2) is not a rule of decision or a procedure bearing on the fairness of the fact-finding process at trial. Nor, under *Rodriquez*, can the impact of the error be measured with reference to the likelihood of success on appeal. This Rule is a mandatory procedural requirement, to help ensure unfettered access to the judicial appeals process itself.

Strict enforcement of Rule 32(a)(2) does not ordinarily or necessarily entail such social costs as reversal of a conviction, retrial, any major duplication of effort or expenditure, or even the lowering of defendant's sentence. Defendant asks only that the court go through the formal step of conducting the sentence in accordance with Rule 32(a)(2). And all that defendant necessarily "gains" as a result is the right to file a notice of appeal as of right.

That appeal will test -- for the first time -- the legality of his conviction, based on an application of the law to the record. There is no question of fading memories or the like. In that appeal, the harmless error doctrine will of course apply to defendant's claims of error, to the same extent as if he had filed a notice of appeal immediately upon conviction. Defendant asks only, in effect, to be reinserted into the procedural context at the point where it went off track.

Thus the harmless error standard really has little application where the question is whether petitioner ever received proper access to the appellate procedure itself, and where the Rule itself is intended to supplant any such case-by-case inquiry.

As discussed in petitioner's brief, similar reasoning applies to the Third Circuit's alternative rationale, based on the high threshold for Section 2255 relief as expressed in *United States v. Timmreck*, 441 U.S. 780 (1979). The "miscarriage of justice" standard for collateral relief presupposes that the defendant has either filed an appeal, or waived his right to do so. As the Second Circuit, distinguishing the Section 2255 cases, put it,

> [W]here a defendant who pleaded guilty was not advised of his right to appeal his sentence in violation of Rule 32(a)(2), his failure to appeal did not bar a motion under § 2255 attacking the sentence; indeed, we ruled the court should vacate the sentence and remand for resentencing. ... [citing *Reid v. United States*, 69 F.3d 688, 690 (2d Cir. 1995)] This procedure assures a defendant 'the opportunity to raise on direct review sentencing claims that might not have been available on collateral attack,' *United States v. Bygrave*, 97 F.3d 708, 710 (2d Cir. 1996), and puts him in the position he would have occupied absent the district court's error.

Valente v. United States, 111 F.3d 290, 292 (2d Cir. 1997)

Amicus curiae NACDL respectfully submits that this Court should not upset the established practice. Like the overwhelming majority of lower courts, it should construe Rule 32(a)(2) straightforwardly and enforce it literally. This bright-line approach best fits the meaning and purpose of the

Rule, and best ensures that appeals from criminal convictions are waived knowingly.

CONCLUSION

For the reasons stated above and in petitioner's brief, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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